

Message Text

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ACTION EUR-12

INFO OCT-01 ISO-00 AF-08 AID-05 CEA-01 CIAE-00 COME-00
EB-08 EA-07 FRB-03 INR-07 IO-13 NEA-10 NSAE-00
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INFO AMEMBASSY LISBON

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PASS TREASURY AND COMMERCE

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SUBJECT: PORTUGUESE FOREIGN INVESTMENT CODE

REF: (A) OECD PARIS 3851, (B) TIR(76)3

1. SUMMARY. MISSION SUGGESTS THAT WASHINGTON CONSIDER MAKING A BILATERAL APPROACH TO GOP TO UNDERLINE OUR CONCERN WITH PRESENT FORM OF PORTUGUESE CODE OF FOREIGN INVESTMENT. WHILE OUR DIRECT INTEREST LIES IN ENCOURAGING COMPLIANCE BY PORTUGAL WITH OBLIGATIONS UNDER OECD CODES OF LIBERALIZATION OF CURRENT INVISIBLE OPERATIONS AND OF CAPITAL MOVEMENTS, SUCH US DEMARCHE PRESUMABLY COULD ALSO SERVE, AS MAY BE CONSIDERED APPROPRIATE, TO INDICATE BROADER CONCERN WITH IMPLICATIONS OF CERTAIN FEATURES OF PORTUGUESE FOREIGN INVESTMENT CODE FOR COUNTRY'S STABILIZATION AND DEVELOPMENT PROSPECTS.
END SUMMARY.

2. REFTEL REPORTS ON INVISIBLE COMMITTEE'S (IC) DIS-
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CUSSION OF PORTUGAL'S POSITION UNDER LIBERALIZATION CODES. ALTHOUGH OTHER RECENTLY INSTITUTED RESTRICTIONS ARE RELEVANT TO CODES, THOSE EMBODIED IN CODE OF FOREIGN INVESTMENT (DECREE LAW NO. 239/76 OF APRIL 6, 1976) CONSTITUTE MOST SIGNIFICANT ONES. MISSION HAS ONLY ONE COPY OF PRINTED CODE (CONTAINING PORTUGUESE, ENGLISH, GERMAN, AND FRENCH VERSIONS) ISSUED IN UNDATED

BLUE/BROWN PAMPHLET BY MINISTERIO DA COMUNICACAO SOCIAL, AND ORESUMES WASHINGTON HAS COPIES. WE NOTE THAT ITS ENGLISH TRANSLATION DIFFERS CONSIDERABLY FROM VERSION CONTAINED IN REF B, CIRCULATED BY OECD SECRETARIAT IN JULY 1976. DIFFERENCES ARE LARGELY STYLISTIC (OECD TRANSLATION IS SMOOTHER), BUT WE NOTE AT LEAST ONE SUBSTANTIVE DISCREPANCY--THE PRESENCE IN REF B OF A PARA 7 OF INTRODUCTION ALLUDING TO A "TRANSITIONAL SYSTEM OF ADAPTION...IN ARTICLE 35...IN FAVOR OF FIRMS ALREADY ESTABLISHED IN THE COUNTRY" WHICH DOES NOT APPEAR IN PRINTED OFFICIAL VERSION (HOWEVER, NEITHER ARTICLE 35 NOR ANY OTHER ARTICLE CONTAINS SUCH PROVISIONS).

3. MISSION CONCURS WITH OBSERVATIONS IN STATEMENT BY OECD SECRETARIAT (SCHLEPEGRELL) MADE AT IC MEETING (COPIES MAILED TO WASHINGTON AND LISBON--SEE REFTEL) WHICH SUMMARIZED BELOW:

(A) DEFINITION OF FOREIGN INVESTMENT: WHILE CODE IS SAID TO DEAL WITH FOREIGN DIRECT INVESTMENT, IT SEEMS TO COVER ALL FOREIGN INVESTMENT, DIRECT AND PORTFOLIO, AND THIS WAS CONFIRMED TO SECRETARIAT REP DURING CONSULTATIONS WITH GOP.

(B) CRITERIA OF ACCEPTABLE INVESTMENT: ARTICLE 4 OF CODE GIVES LIST OF 12 VAGUE CRITERIA TO BE TAKEN INTO ACCOUNT, MOST OF WHICH COULD FIT ALMOST ANY ACTIVITY.
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(C) NATIONAL TREATMENT: THERE IS FORMAL DISTINCTION (BUT NOT CLEARLY DEFINED) BETWEEN "GENERAL" REGIME FOR FOREIGN-CONTROLLED ENTERPRISES WHICH ENJOYS SAME CONDITIONS AS NATIONAL ENTERPRISES AND "CONTRACTUAL" REGIME WHICH APPLIES TO INVESTMENT OF "PARTICULAR INTEREST" TO PORTUGUESE ECONOMY TO WHICH SPECIALLY TAILORED CONDITIONS WOULD APPARENTLY APPLY.

(D) INCOME TRANSFER: PORTUGUESE CODE LAYS DOWN VARIOUS RESTRICTIONS ON INCOME TRANSFER, LIQUIDATION PROCEEDS, INDEMNIFICATION IN CASES OF EXPROPRIATION OR NATIONALIZATION AND EARNINGS OF FOREIGN NATIONALS WHICH ARE IN OBVIOUS CONFLICT WITH PORTUGUESE OBLIGATIONS UNDER RELEVANT ITEMS OF THE OECD CODES. (COMMENT: MISSION BELIEVES THESE TO BE MOST DETRIMENTAL PROVISIONS.)

(E) TRANSFER OF TECHNOLOGY: THERE APPEARS TO BE A

CONFLICT IN ARTICLE 35, ON TRANSFER OF TECHNOLOGY, OF

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PORTUGUESE CODE (WHICH REQUIRES PREVIOUS AUTHORIZATION)
AND OECD INVISIBLES CODE ITEMS ON "TECHNICAL ASSISTANCE"
AND "PATENTS, DESIGNS, TRADEMARKS AND INVENTIONS."

(F) NON-RESIDENT-OWNED BLOCKED FUNDS: PORTUGUESE
CODE APPLICATION WILL RESULT IN CREATION OF NON-RESIDENT
OWNED BLOCKED FUNDS; HOWEVER, NO PROVISION IS MADE FOR
THESE FUNDS AS TO PERMISSIBLE AND NON-PERMISSIBLE USES,
AND EXEMPTIONS IN HARDSHIP CASES.

4. ABOVE-NOTED STATEMENT NATURALLY MADE IN CONTEXT OF
PORTUGAL'S OBLIGATIONS UNDER OECD CODES. MISSION WOULD
ADD OTHER OBJECTIONS WHICH COULD BE LESS READILY RAISED
IN IC AS THEY DO NOT DIRECTLY RELATE TO THOSE CODES'
PROVISIONS, BUT SEEM TO BE SERIOUS DEFECTS IF GOP
INTENTION IS TO ENCOURAGE FOREIGN INVESTMENT IN ORDER
TO ENHANCE PROSPECTS FOR STABILIZATION AND DEVELOPMENT.
THEIR DISCUSSION WITH GOP OFFICIALS SEEMS WARRANTED.
(NOTE: SECRETARIAT STATEMENT INDICATES THAT BODY TO
ADMINISTER CODE--FOREIGN INVESTMENT INSTITUTE--NOT YET
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ESTABLISHED AND THAT CODE MAY BE REVISED.) THESE DEFECTS INCLUDE:

(A) TRANSITION. THERE IS NO GRANDFATHERING PROVISION FOR FIRMS IN PORTUGAL AT TIME OF ENTRY INTO FORCE OF INVESTMENT CODE (SEE PARA 2 ABOVE). IN THEORY, ARTICLE 32 COULD BE USED TO FORCE OUT OLD FIRMS.

(B) INCORRECT INVOICING. ARTICLE 35 SEEMS INAPPROPRIATE IN A LAW COVERING FOREIGN INVESTMENT ONLY. ITS EXISTENCE IN THIS CODE SUGGESTS DIFFERENTIAL TREATMENT OF FOREIGN AND DOMESTIC FIRMS.

(C) GENERAL VAGUENESS. MANY PROVISIONS OF CODE ARE EXTREMELY VAGUE OR AMBIGUOUS. FOR INSTANCE, IF LITERALLY INTERPRETED ARTICLE 10(1) WOULD REQUIRE "REGISTRATION" (I.E., AUTHORIZATION) FOR ALL RETAINED EARNINGS. ARTICLE 14(3) PERMITS TRANSFER OF LIQUIDATION PROCEEDS OF 20 PERCENT ANNUALLY, BUT IT IS NOT CLEAR FROM 14(1) WHETHER THIS QUOTA COMMENCES ONLY AFTER FIVE YEARS FROM DATE OF IMPORT. IN ARTICLE 13(2), IT IS NOT CLEAR WHETHER PERCENTAGE PERMITTED FOR PROFIT REPATRIATION IS BASED ON ORIGINAL INVESTMENT OR ORIGINAL INVESTMENT PLUS RETAINED EARNINGS.

5. US MEMBER OF IC PLANS TO TAKE POSITIONS AS OUTLINED PARAS 3 AND 4 ABOVE AT NEXT IC MEETING (MARCH 23-25). HOWEVER, MISSION BELIEVES THAT IN A PARALLEL EFFORT THESE POINTS COULD ALSO BE MADE--PROBABLY MORE EFFECTIVELY AND EASING IC'S TASK AS ADDITIONAL BENEFIT--THROUGH APPROPRIATE HIGH LEVEL BILATERAL CONTACTS WITH GOP. FOR INSTANCE, IC CONSIDERS ACTUAL PRACTICES, WHICH BY VIRTUE OF WAIVERS OR NON-IMPLEMENTATION OF PROVISIONS OF LAW MAY CURRENTLY BE RELATIVELY LIBERAL, WHILE POTENTIAL INVESTORS MAY BE MORE CONCERNED WITH ADVERSE TONE OF LAW. WHILE IMPORTANCE OF INTERNATIONAL OBLIGATION

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TIONS SUCH AS OECD LIBERALIZATION CODES SHOULD PLAY PROMINENT PART IN ANY DEMARCHE, WE SUGGEST THAT ARGUMENT WOULD BE MOST CONVINCING IF PRESENTED IN TERMS OF NEED TO REASSURE EXISTING FOREIGN INVESTORS AND ATTRACT NEW ONES AS PART OF GOP'S STABILIZATION PROGRAM. HOWEVER, IF SUCH A MESSAGE HAS ALREADY BEEN CONVEYED, IT WOULD STILL BE HELPFUL TO URGE GOP TO TAKE OECD CODES INTO CONSIDERATION WHEN REVIEWING POSSIBLE REVISION OF POR-

TUGUESE INVESTMENT LAW SO AS TO MINIMIZE RESTRICTIVE
MEASURES REQUIRING DISPENSATION UNDER DEROGATION PROVI-
SIONS OF CODES AND THEREFORE TO INCREASE LIKELIHOOD OF
FAVORABLE INVISIBLES COMMITTEE REPORT.
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Message Attributes

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